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bail hearing

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 727-2 (JSR)

5 MARCIN JAKACKI,

6 Defendant.

7 -----x

8  
9 December 22, 2015  
4: p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
17 Southern District of New York

BY: SIDHARDHA KAMARAJU

18 Assistant United States Attorney

19 LAW OFFICES OF JOSHUA L. DRATEL, P.C.

20 Attorneys for Defendant

21 BY: LINDSAY ANNE LEWIS

22 WHITNEY G. SCHLIMBACH  
23  
24  
25

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1 (Case called)

2 MR. KAMARAJU: Good afternoon, your Honor. On behalf  
3 of the government, Sid Kamaraju and Louis Pellegrino.

4 THE COURT: Good afternoon.

5 MS. LEWIS: Good afternoon, your Honor. Lindsay Lewis  
6 of the Law Offices of Joshua Dratel, and with me at counsel  
7 table is Whitney Schlimbach on behalf of Marcin Jakacki.

8 THE COURT: Good afternoon.

9 We are here on a renewed bail application so let me  
10 hear first from defense counsel.

11 MS. LEWIS: Thank you, your Honor. I think the  
12 strength of Mr. Jakacki's bail application, in terms of his  
13 ability through that package to secure his presence at all  
14 future court appearances speaks for itself, but while I would  
15 like to address the merits of that particular package I first  
16 just wanted to address the government's response to my papers  
17 as obviously I have not put in a submission on that. But, I  
18 will do so in the context of the bail factors under 3142 in and  
19 particular the ones that the Court identified in terms of risk  
20 of flight.

21 First, in regard to the severity of the offense  
22 conduct and penalties associated with these crimes, the  
23 government here has identified a specific weight amount that  
24 equates to the 500,000 pills that they allege that Mr. Jakacki  
25 was involved with, and in identifying that amount they've

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1 conducted their analysis under the weight of the drugs. I  
2 would first just start by saying that while I don't object to  
3 their analysis that those are the weights that they've  
4 identified, I do think that this capitalizes on the guidelines  
5 @ten ken is I to apply --

6 THE COURT: Well, let me put it to you this way and I  
7 will see if the government, when we get to them, wants to  
8 respond.

9 Surely anyone who has practiced in this court for any  
10 time over the last decade or more knows that if there is one  
11 judge who finds the guidelines inherently irrational, bordering  
12 on the absurd, it is the judge you are talking to right now.  
13 So, I don't know that I should pay any attention to the  
14 guidelines let alone the competing views of the guideline  
15 calculation that you and the government have because if the  
16 defendant thought he faced one guideline range and the judge  
17 was likely to impose that range, that might be a factor in his  
18 flight risk one way or the other depending on what that range  
19 was. But, if the defendant has been informed by his counsel,  
20 as I assume he has, that with this darn judge you never know  
21 where the hell he is coming out because he pays very little  
22 attention to the guidelines, then it becomes a much less  
23 relevant factor. So, now what is relevant is that if convicted  
24 under any analysis he faces a significant risk of prison time  
25 and not trivial prison time like two days or five days or

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1 something like that. But that's about, I think, as far as one  
2 could go in assessing that particular factor.

3 So, I'm happy to hear whatever anyone else wants to  
4 say on the guidelines because I forgot to bring a novel to read  
5 while you guys had that debate, but I'm perfectly prepared to  
6 hear you out and catch up on my sleep. But maybe you want to  
7 move on now to something else.

8 MS. LEWIS: Yes. I am aware that I am preaching to  
9 the choir on that one.

10 So, moving on to I think the related issue of the  
11 weight of the evidence which does speak to whether  
12 realistically my client would face, as you say, years under any  
13 guidelines analysis. I do want to refer to the indictment and  
14 the discovery we received so far which there is no evidence  
15 that my client was involved in any of the alleged conduct prior  
16 to September of 2015. If the government has evidence that  
17 shows this, certainly I would like to see it.

18 The undercover calls that they identified, those calls  
19 are just from September and October 2015 and they involve about  
20 700 milligrams of Oxycodone. Nor does a blank prescription pad  
21 which the government acknowledges -- or identifies was found in  
22 Mr. Jakacki's home that he shares with his wife suggests any  
23 time frame in which anyone would have been involved in any  
24 conduct or in fact that there was any distribution or any  
25 illegal conduct there either. Nor does their reference to the

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1 2012 purchase of this home demonstrate illegal conduct prior to  
2 2015. In order to show that there would be some relevance  
3 there the government would have to present evidence that  
4 Mr. Jakacki knew that the funds deposited in bank accounts that  
5 were used to purchase the couple's home were the proceeds of  
6 the narcotic trafficking conspiracy and I haven't seen evidence  
7 of that either.

8 So, in terms of the weight of the evidence, I think  
9 that the range of the conspiracy which starts in 2010 going  
10 through 2015 up until about September 2015, I don't think there  
11 is any evidence that backs up the government's claims which I  
12 think also really limits the range of the conduct that we are  
13 even referring to here and assessing the weight of.

14 But, I will move on from that because I think that  
15 there are some other issues with regard to the risk of flight.

16 THE COURT: How old is his son?

17 MS. LEWIS: He is 11 years old.

18 Mr. Jakacki left Poland when his son was about 1 years  
19 old and moved out of the residence when his son was an infant  
20 about three or four months old. He has not seen him once in  
21 that period of time. The government refers in their letter  
22 to --

23 THE COURT: Why not?

24 MS. LEWIS: Sorry?

25 (Defendant and counsel conferring)

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1 THE DEFENDANT: Your Honor, because I have never been  
2 in Poland.

3 THE COURT: Excuse me?

4 THE DEFENDANT: I don't -- I never back to Poland for  
5 past 10 years, that's why I don't see my son.

6 THE COURT: So you feel no sense of responsibility to  
7 your son?

8 THE DEFENDANT: Maybe I'm not good father, okay, for  
9 my son, in Poland.

10 THE COURT: Who cares for your son now?

11 THE DEFENDANT: My ex-wife and my parents, I think.

12 THE COURT: All right.

13 Go ahead, counsel.

14 MS. LEWIS: I think the fact that Mr. Jakacki is not  
15 even sure who cares for his son is indicative of the lack of  
16 relationship there. Obviously it is unfortunate but it also, I  
17 think, whatever relationship they do have I would describe more  
18 as a sense of some small obligation rather than disingenuous  
19 that result in him ever leaving his family here to go back  
20 there.

21 The same is true for his parents. Mr. Jakacki has  
22 expressed to me that he was never close with his parents and  
23 that estrangement has only grown and become more fermented in  
24 the time he was here. His maternal grandmother is here, he is  
25 close to her, but his real family for the last eight year is

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1 his wife --

2 THE COURT: Does he have siblings?

3 MS. LEWIS: He has one brother who lives in Brooklyn  
4 although they don't have a relationship either.

5 THE COURT: He seems to me a master at lack of  
6 relationships.

7 Go ahead.

8 MS. LEWIS: I would say to the exception of his  
9 relationship to his grandmother who he sees every week and with  
10 his wife and wife's family which the relationship with the  
11 family is extremely strong.

12 Obviously it has been identified by the government and  
13 in papers that he had been having an affair recently. That's  
14 something that Mr. Jakacki and his wife have been working  
15 through. Obviously difficult to do when one of them is  
16 incarcerated, but the call that the government actually refers  
17 to in their letter, the November 14th call between Mr. Jakacki  
18 and this other woman, it actually predated their attempts to  
19 really reconcile and to work on their marriage. Mr. Jakacki's  
20 in-laws are all aware of the issues they've had in the marriage  
21 which also stems from infertility issues that they've been  
22 having. They've been trying to have a kid which has put a lot  
23 of strain on the relationship for the last several years.

24 But, anyway, they all stand behind him very strongly  
25 and support him. In fact, here today in the courtroom is his

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1 mother-in-law, his sisters-in-law, two of them, Stella and  
2 Elizabeth, both of whom are co-signers, and obviously his wife  
3 as well, also his co-defendant Lilian Jakacki is in the second  
4 row. So, they do stand behind him and they are prepared to  
5 sign a bond and, more significantly, they are also prepared to  
6 post a significant amount of property, enough to collateralize  
7 a full bond which includes both the \$530,000 that Mr. Jakacki  
8 and his wife still have unencumbered in their own home which  
9 the rest of that money has gone toward their payment to post  
10 bond for Mrs. Jakacki, and they also have an \$870,000 mortgage,  
11 that's the remaining amount of money there.

12 So, the \$530,000 in Mr. Jakacki's home and another  
13 \$1.5 million to \$1.8 million depending which appraisal you look  
14 at for his mother-in-law's home, so together that's over \$2  
15 million in property which would ensure any future appearance  
16 here. And, again, that also includes five co-signers or up to  
17 five co-signers if the Court deems necessary, although I would  
18 note that originally when bail was set in this case --

19 THE COURT: You are right, \$2 million would even be  
20 enough to perhaps purchase a closet in Manhattan.

21 Go ahead.

22 MS. LEWIS: So, in terms of his bail package, I feel  
23 like that is incredibly strong especially when you take into  
24 consideration the other things that would be present. He is  
25 amenable, obviously, to electronic monitoring, home detention.

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1 There are a number of things that could further cement his  
2 station here.

3 In terms of financial resources that he might have  
4 available to him, I think the government's assessment here is  
5 overblown. As we described in our papers, all the assets are  
6 either that the couple has either been unduly encumbered or  
7 have been seized by the government; that includes the cash in  
8 the house, the \$4,000 of cash in the house and the \$3,000 that  
9 the government acknowledges Mr. Jakacki had mentioned was in  
10 his car, although I would want to mention so the Court  
11 understands --

12 THE COURT: So, if I were to release him when you say  
13 home confinement, where would that be?

14 MS. LEWIS: It would be with his wife at their home in  
15 Connecticut which actually would also be beneficial to the  
16 extent that it would allow them to both prepare for their case  
17 and to also mend their marriage. And that is something that we  
18 have addressed with them, Mrs. Jakacki's counsel Adam  
19 Perlmutter is here as well as Lilian Jakacki herself and  
20 everybody is on board with that and that's what they all very  
21 much want.

22 THE COURT: All right.

23 I know you have other points to make.

24 MS. LEWIS: I'm happy not to make them unless the  
25 Court has questions.

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1 THE COURT: Let me hear from the government and we  
2 will come back to you in a minute.

3 MR. KAMARAJU: Thank you, your Honor.

4 I will not belabor the guidelines point given as I  
5 know your Honor's views on them, but I think your Honor did  
6 settle on the most salient point here which is that regardless  
7 of what guidelines analysis is used, the defendant faces a  
8 significant criminal sentence as your Honor found about the 60  
9 years total of imprisonment obviously based on the statutory  
10 maximum.

11 So, he faces a significant amount of time and that's,  
12 frankly, regardless of whether, as the defense puts it, his  
13 role in the Oxycodone distribution conspiracy is confined to  
14 September and October of 2015 given that he is also charged in  
15 two separate money laundering counts but with respect to that,  
16 the government has obviously laid out a considerable amount of  
17 detail in the indictment. We have produced discovery that show  
18 bank records, we have produced records that show the Oxycodone  
19 overflow. Obviously, were the case to proceed to trial some  
20 part of our evidence would be witness testimony which is not  
21 typically disclosed as regular discovery. So, I think if we  
22 were to proceed to trial there would be witness testimony that  
23 defense counsel would contest shows his knowledge.

24 But, regardless, the fact of the matter is that, as  
25 your Honor highlighted in the original decision, there are

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1 undercover recordings here, there are videotape meetings with  
2 Lilian Jakacki, there are recorded telephone conversations with  
3 Marcin Jakacki. And when she specifically asked, the  
4 undercover agent, "Are you a DEA agent? I want to confirm" --  
5 excuse me when he was specifically asked for the undercover  
6 agent's name to confirm whether she is a DEA agent where he  
7 addresses regulations governing Oxycodone distribution and how  
8 to avoid them, all of this evidence is laid out in the  
9 indictment, and as the Court is well aware as you identified in  
10 your decision, the weight of the evidence is one of the factors  
11 under 3142.

12 So, however the defense counsel chooses to parse up  
13 the charges, the fundamental fact here is that he faces a  
14 significant amount of time, there is a substantial amount of  
15 evidence against him, and those are two of the factors that  
16 weigh in favor of bail particularly when, as in a case like  
17 this, you are dealing with a presumption that the defendant has  
18 to overcome.

19 And I would like to -- I would like to address -- as  
20 the Court is well aware, it is a combination of the factors  
21 that are relevant in determining whether the defendant was able  
22 to overcome the presumption in this case and so two of the  
23 factors already the government would argue weigh in favor of  
24 detention whether it is severity of the offenses and the weight  
25 in this case.

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1           The other factors, specifically the defendant's family  
2       ties here, I think the Court highlighted it aptly; he appears  
3       to be a master of avoiding relationships except apparently when  
4       they serve his interest. So, he has no relationship with his  
5       family in Poland he says but he provides money, through his  
6       mother who he claims to be estranged from but who he entrusted,  
7       I believe defense counsel's submission said \$5,000 or \$6,000  
8       for the care of his son with no discretion. Whether that  
9       relationship is strained or not it is clear that there is in  
10      fact a relationship.

11           The same thing, he claims to speak with his son two or  
12      three times a year. The fact is whatever the quality of his  
13      life is in Poland there is a life there for him to go to and  
14      that is the relevant factor for your Honor's consideration and  
15      it is the factor, frankly, that your Honor already found in the  
16      November 4th decision.

17           On the other hand, when it comes to his ties here,  
18      again, the defendant is very opportunistic in a phone call with  
19      the woman which he was having an affair. The government -- it  
20      is not our intention to highlight painful subjects but merely  
21      pointing out in a circumstance in which the defendant was  
22      speaking confidentially -- I imagine he thought -- with the  
23      woman with whom he was having an affair, he said: I'm not  
24      going home to my wife. But now, to your Honor, when it comes  
25      to a bail application, his point is I would like to move home

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1 with my wife. I will be there, I will live with her, we have  
2 reconciled.

3 THE COURT: Well, what do you make of the fact that  
4 his in-laws are so clearly supportive of him both on personal  
5 terms and in putative financial terms? That certainly -- they  
6 would have every reason to want to cast him aside given the  
7 affair that he had but they seem to feel strong ties to him.  
8 That suggests, maybe, that his long-term, if you will,  
9 emotional and psychological welfare, lie in this country.

10 MR. KAMARAJU: Your Honor, I think it speaks to their  
11 forgiving nature and that may be true. And the government has  
12 no knowledge to dispute that and I don't doubt that they have,  
13 as expressed in their letters, that they have a desire to  
14 support him. But the relevant question is not their nature,  
15 the relevant question is the defendant's nature and the  
16 defendant, to use your Honor's language again -- I don't mean  
17 to parrot it over and over again --

18 THE COURT: It seems like a good -- feel free to quote  
19 me. I won't mind.

20 MR. KAMARAJU: Well, I don't want to bastardize  
21 everything your Honor says, but --

22 THE COURT: I think the technical term is "suck up"  
23 but, go ahead.

24 MR. KAMARAJU: We are the government, your Honor.  
25 What can we do.

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1           He chooses to assert these relationships at the time  
2 when they serve him best. He is a master of none when it seems  
3 to suit him when he tries to apparently, as he said, or to  
4 paraphrase him, avoid his obligations to his son but when it  
5 comes time that he needs to clothe himself in family, he  
6 asserts to your Honor that all of his family members are behind  
7 him.

8           On the other hand, when speaking just a month ago -- I  
9 mean I recognize that defense counsel asserted that this call  
10 that the government cited to predated this reconciliation but  
11 it couldn't have predated it by much, your Honor. Defense  
12 counsel maybe can answer it but I would suspect it is a matter  
13 of weeks at most and in this case what you see is, in that case  
14 if that is true, that just weeks before reconciling the  
15 defendant said if they let me out, I'm going to put on my  
16 bracelet and I'm going to move in with you. I'm going to leave  
17 my wife and tell pretrial I'm home.

18           So, your Honor, I think that undercuts the defendant's  
19 view of the strength of his relationships, not his in-laws.  
20 Views of the strength of the relationship, the government  
21 submits, is frankly irrelevant.

22           So, unless your Honor has additional questions?

23           THE COURT: One question.

24           @I wasn't sure whether, first whether technically this  
25 is a factor the Court should consider and secondly whether,

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1 even if I should how much weight to give it, but that your  
2 adversary makes the point that they will be infinitely better  
3 able to prepare his defense if he is out on bail. Now, part  
4 that have was couched in terms of language aspects although he  
5 can read and speak English but most of it is just on the sort  
6 of common sense notion that it's infinitely easier to spend a  
7 lot of time with your counsel preparing your defense when you  
8 are not in jail.

9 MR. KAMARAJU: Well, as your Honor knows, that's not a  
10 factor under the bail reforms, under the bail statute, and if  
11 it were a factor under the bail statute then I'm not sure how  
12 any defendant, at least on risk of flight, could ever be  
13 detained because that is true for every defendant. For every  
14 defendant, as you put it, the common sense notion is that the  
15 more liberty or the more freedom they have with which to meet  
16 with their counsel, the easier it is to prepare. But, if that  
17 were the case or if that were a factor for the Court to give  
18 either consider in the first place or give significant weight  
19 to, then it would be a factor in every single detention  
20 argument.

21 THE COURT: Well, no. I mean I'm not sure that  
22 makes -- I will hear your adversary on whether it is a factor  
23 at all but the fact that it would be present in every case  
24 doesn't mean it would be dispositive in every case, it would  
25 just be a factor in every case. I mean if you take that

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1 argument and turn it on its head the defense would argue, well,  
2 in the overwhelming majority of federal drug cases the  
3 potential penalty is very high and, therefore, we should not  
4 worry about that because it's going to mean the detention  
5 automatically of every defendant who is charged with a drug  
6 offense. And so, I'm not sure that these arguments about, that  
7 cut across the board are necessarily eliminated by the fact  
8 that they cut across the board. It seems to me they're present  
9 in every case for a good reason that the Court should weigh in  
10 the balance.

11 MR. KAMARAJU: Well, to the extent the Court would  
12 consider the factor and all I appreciate that it wouldn't be  
13 dispositive. I think that if the Court were to weigh it the  
14 question would be how -- does it actually prevent the defendant  
15 from preparing a defense and in this case you have an instance  
16 in which the defendant certainly can communicate with his  
17 lawyer, in which the defendant also, based open his own words  
18 or the words from family, has the ability to communicate with a  
19 co-defendant of his who has received, I believe if not all of  
20 the same discovery substantially the same discovery and against  
21 whom many of the same charges are levels who speaks both polish  
22 and English English and who, if the defendant is taken at his  
23 word and co-defense are also taken at their word, are working  
24 together to defend against this case.

25 So, whatever weight typically your Honor may give to

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1 that factor in, say, a drug case, a courier case, for example,  
2 with a non-English speaker who is picked up in this country  
3 without any of these factors, in this case that's not the case  
4 before your Honor. Here what you have is you have a defendant  
5 who has retained counsel, retained exceptional counsel who has  
6 been able to prepare a bail argument for him, who can continue  
7 to deal with him with respect to the discovery, who can analyze  
8 it, and who can work with his family and co-defendants.

9 I don't think in this case whatever weight it  
10 typically may have that it should play a significant role in  
11 your Honor's decision.

12 THE COURT: By the way, have we set a trial date in  
13 this case yet in this case.

14 MR. KAMARAJU: I do not believe we set a trial date.  
15 We set a date to come back after motions were filed.

16 THE COURT: When is that conference on the motions.

17 MR. KAMARAJU: I believe it is January 16th. I can  
18 confirm it if I can look at my calendar, your Honor, unless  
19 that's a Sunday gentleman it is a Saturday.

20 MR. KAMARAJU: So then I think it is January 15th,  
21 your Honor.

22 THE COURT: Maybe we should set a trial date.

23 MR. KAMARAJU: The only issue, your Honor, is that the  
24 third defendant and counsel is not here.

25 THE COURT: True.

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1 MR. KAMARAJU: So.

2 THE COURT: We will wait for the January conference.

3 Okay.

4 Let me hear again from defense counsel.

5 MS. LEWIS: Thank you.

6 I will just respond first to the discussion that was  
7 just raised about the additional factor that may or may not be  
8 part of the traditional baying argument here.

9 Obviously I think had we discuss bail it is not  
10 unreasonable ever for fairness to come into play so I would say  
11 that it should be something to be considered against whether  
12 thrrp conditions that would secure the defendant's release  
13 which I say are present here, along with that factor to say  
14 that if that is the case then certainly something that hinders  
15 the fairness of the proceeding would always weigh in favor  
16 after lug the defendant's release. But, I also say that I'm  
17 going to assume here -- and correct me if I am wrong -- that  
18 Mr. Kamaraju has never been a defense attorney because had he  
19 been one he would know how truly difficult it is to communicate  
20 with a client who is incarcerated regardless of the quality of  
21 counsel or the time counsel has available. It has taken me a  
22 couple of weeks, three maybe, since coming into this case, to  
23 put together a bail argument that had I had better access to my  
24 client, I would have been able to put it together far faster.  
25 It takes longer to analyze the discovery, to go over it with my

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1 client, to convey conversations that I had with outsiders to my  
2 client to find out if they're accurate or not, to find out who  
3 I need to contact on his behalf. And this doesn't just go to  
4 bail but certainly the fact that it has taken as long as it has  
5 to put this together is indicative of a bigger problem --

6 THE COURT: Of course, having been a criminal defense  
7 lawyer for 16 years I wouldn't have any idea what you are  
8 talking about. But, go ahead.

9 MS. LEWIS: If you did, maybe you did, I would also is  
10 that you just going to the discovery in this case, we have  
11 clearly a dispute here over what role, if any, my client has  
12 played in this conduct and my ability to effectively defend him  
13 and to establish what I believe to be --

14 THE COURT: The government says that even on what you  
15 have seen already this is a strong case.

16 MS. LEWIS: I disagree.

17 THE COURT: The recordings and whatever, what about  
18 that.

19 MS. LEWIS: Those recordings, where he still talking  
20 September and October 2015 and I have looked at the bank  
21 records, I don't see a connection to my client that establishes  
22 money laundering to the extent that he had knowledge of a drug  
23 conspiracy. I mean these are all allegations as far as I'm  
24 concerned and I'm prepared to dis prove as many if not all of  
25 them but I do believe that I need my client available to me and

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1 to be able to meet with co-counsel and to do what we need to do  
2 in order to get to a place where we can resolve this case in  
3 the most effective and most fair manner possible.

4 THE COURT: By the wakes is the government maintaining  
5 that he is a flight risk, a danger to the community both? Or  
6 what.

7 MR. KAMARAJU: The the government is arguing primarily  
8 on flight risk.

9 THE COURT: So, the reason I raise that I wonder --  
10 the presumption of course operates in both situations, but I  
11 wonder whether where there is danger to the community,  
12 overcoming the presumption seems to be quite difficult but  
13 where it is a flight risk it seems to me it is not such a --  
14 that the presumption doesn't operate with the same, quite  
15 ultimate force because all that is meant by the presumption in  
16 that situation is that these crimes carry heavy penalties,  
17 right? The presumption is part of the war on drugs and its  
18 origins and Congress, presumably, saw the continuation of the  
19 drug trade on the part of some to be a potential danger to the  
20 community but that's night factor that the government is  
21 invoking into the case of this particular defendant. The  
22 presumption with respect to flight arose in, if it had a,  
23 because even Congress has to have a rationale for any  
24 presumption under the constitution -- arose from both the  
25 international nature of many narcotics conspiracies but that

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1 doesn't seem to have been particularly a factor that the  
2 government is relying on in this particular defendant's  
3 situation, or a heavy penalties note the heavy penalties that  
4 attach to drug offenses which the government of course is  
5 relying on but it seems in some ways to be double-counting it  
6 to say not only is there a presumption here but there is also a  
7 heavy penalty. If the heavy penalty is the reason for the prum  
8 no period before F note.

9 MR. KAMARAJU: Is your Honor saying it would be double  
10 counting to because the presumption is tied to the heavy  
11 penalty that you should also consider the heavy penalty a  
12 separate factor? I want to make sure I understand.

13 THE COURT: What I am saying is in is assessing  
14 whether the presumption is overcome and clearly the burden is  
15 on the defense to overcome presumption, I think it's not  
16 unreasonable to look at what were the factors that led Congress  
17 to impose the presumption and see which of those factors  
18 operate here, and if certain of the factors don't operate, that  
19 doesn't mean the presumption disappears but it may mean that  
20 less is required to overcome it.

21 MR. KAMARAJU: Well, I mean I think as a matter of  
22 common sense, as your Honor articulated certainly in a case  
23 that involves violence or danger to the community there is an  
24 additional consideration I guess to overcoming the presumption.

25 I any with respect to sort of the sliding scale of

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1 sorts that it sounds like your Honor is suggesting, I think  
2 it's fair to say that when different factors are in play,  
3 obviously the presumption has more force than it does in other  
4 cases. I do think, however, that given that fundamentally what  
5 we are talking about is whether a person will flee a potential  
6 prison sentence that the fact of a significant penalty is sort  
7 of a common sense basis on which to ground the prum hung is all  
8 I'm saying, your Honor.

9 THE COURT: Well, I think that's fair.

10 What percentage of person of defendants in the  
11 Southern District of New York who have been released on bail  
12 but with home confinement and electronic monitoring have fled?

13 MR. KAMARAJU: I don't have an exact percentage of  
14 that, your Honor. I'm sure it is not a substantially high  
15 percentage and I can try to find out if it would inform your  
16 Honor's decision.

17 THE COURT: Well there are two ways of looking at that  
18 because the statistic could be misleading because it could be  
19 that bail was denied in the great majority of cases where there  
20 might otherwise have been a real meaningful possibility of  
21 flight but I am struck by the fact that in the 20 years I have  
22 been on the bench only one defendant before me has ever fled  
23 and his bail package was on consent. No one saw it coming,  
24 even the government.

25 MR. KAMARAJU: Well, like I said, your Honor, I can't

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1 give you a specific percentage but I know within the last eight  
2 months to a year there was a case in the eastern district where  
3 a defendant put his electronic monitoring bracelet on a ceiling  
4 fan so that the motion was generated, your Honor may have heard  
5 about that case and fled that way.

6 I had a case in front of Judge Cote is an extradition  
7 days in which a \$2 million personal bond was set the defendant  
8 need to Dominican Republic where the bond was signed by close  
9 members of the defendant.

10 So, while I think your Honor's question about the  
11 statistic certainly brings up the fact that most defendants who  
12 I believe are on home confinement don't abscond, it does happen  
13 and it is not impossible for it to happen.

14 THE COURT: I'm not surprised something like that  
15 happened in the Eastern District. There is no accounting for  
16 what will happen there.

17 MR. KAMARAJU: That is true. I'm reluctant to rely on  
18 Eastern District precedent, your Honor, but.

19 THE COURT: Let me go back to your adversary for a in.

20 MS. LEWIS: I wanted to respond to one point which is  
21 to say that while I don't have the precise percentage for the  
22 category that you described, the District, in this particular  
23 circumstance with home confinement, I do know that what my  
24 adversary identifies is the far and away exception and not the  
25 rule. I believe that the number is somewhere for -- and I

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1 think this encompasses perhaps both state and federal, about 2  
2 percent, perhaps? I have heard somewhere between 1 and.  
3 percent there a defense organization recently that was  
4 inquiring about the bail statute

5 THE COURT: Of course a point out to government  
6 counsel the meaningful sense of that statistic you would have  
7 to know whether -- what percentage of people are being denied  
8 bail. You would have to know all sorts of things for that  
9 statistic.

10 If, for example, judges are routinely denying bail in  
11 any close case then, of course, the percentage of people who  
12 run is going to be low. If judges conversely are routinely  
13 releasing people in close cases and the personal was still low,  
14 then there that would be a much more forceful statistic.

15 So, it would be say very difficult statistic to  
16 evaluate without a lot of information.

17 It is troubling to me that not one word has been said  
18 by either side -- I am note I am fortunate to notice very able  
19 counsel on both sides -- about sort of the most fundamental  
20 aspect of the right to bail under the constitution, one that  
21 Congress for got about with the full advice and consent of the  
22 Supreme Court decades ago which is someone acautioned of a  
23 crime is presumed innocent and therefore is entitled to his or  
24 her freedom until convicted baring danger to the community,  
25 flight risk and all the things you have discussed, presumption

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1 and so forth.

2 It is as if the excesses of confinement by the English  
3 that led the founding fathers to place the bail provision into  
4 the constitution has been ripped from our collective memories  
5 and replaced with factors and presumptions and calculations but  
6 I'm just getting too old.

7 So, anyway, anything else either counsel wanted to  
8 say?

9 MR. KAMARAJU: Nothing more from the government, other  
10 than if it is relevant to the Court's determination, I was a  
11 defense lawyer for a very brief period of time, and a poor one  
12 at that many.

13 THE COURT: I have found that prosecutors in the  
14 Southern District of New York, even without being defense  
15 lawyers, are among the most fair-minded prosecutors in the  
16 nation so that's not a requirement but I am glad you were  
17 paroled.

18 Anything further from defense counsel?

19 MS. LEWIS: Just to the extent that I obviously concur  
20 with the Court that the right to bail is something that is beck  
21 essential and the bail statute has largely turned on its head  
22 and obviously the hope the Court's decision today reflects not  
23 only the intentions of that right to bail at its inception but  
24 also the fact that we do have a package here that the people  
25 involved in are eyes open, fully aware of. These are very

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1 intelligent, very thinking, smart people who also have a  
2 long-standing relationship with this man who has been close to  
3 them for the past eight years and surely --

4 THE COURT: And I don't mean to pursue this sin  
5 include but I wonder a little bit about whether what is of  
6 concern to them, ultimately, is the welfare of his wife, their  
7 blood relative.

8 MS. LEWIS: I think --

9 THE COURT: What they would want to see for her sake  
10 is a reconciliation and they may feel that they should do  
11 everything in their power because of their love for her to  
12 maximize that possibility. That doesn't necessarily bear on  
13 their feelings for him and it even less bears, as the  
14 government points out, on his feelings for them. But, I don't  
15 know any of that, I'm just hypothesizing.

16 MS. LEWIS: I would say from my own conversations I  
17 don't think the two points are mutually exclusive. I think  
18 that obviously they do want the best for their sister,  
19 daughter, respectively, and luckily for them the fact that they  
20 both feel complete faith that Marcin will abide by the  
21 conditions of his bond and also that they want him to be  
22 returned to his wife so that they can be together during what  
23 is certainly a difficult time which in part has led to this  
24 reconciliation and reelingzation of what is truly important to  
25 both of them, those interests coincide and so I think for that

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1 reason as well it should be yet another reason why bail is  
2 appropriate in this case.

3 THE COURT: All right.

4 Well, the unfortunate part of having two splendid  
5 counsel in front of me is a can't make up my mind right now so  
6 I will make it up by tomorrow and we will issue an opinion  
7 since the court house is closed on the 24th I will issue is  
8 before 5:00 tomorrow one way or the other but I thank all  
9 counsel for their help and this matter is taken sub judice.

10 oOo